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THE CHANNELLING FUNCTION IN FAMILY LAW

*Carl E. Schneider**

Every culture has two main functions: (1) to organize the moral demands men make upon themselves into a system of symbols that make men intelligible and trustworthy to each other, thus rendering also the world intelligible and trustworthy; (2) to organize the expressive remissions by which men release themselves, in some degree, from the strain of conforming to the controlling symbolic, internalized variant readings of culture that constitute individual character.

PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC

* Professor of Law, University of Michigan. This essay is an expanded version of the Sidney & Walter Siben Distinguished Professorship Lecture, delivered April 1, 1992, at the Hofstra University School of Law. A version of this essay directed to some constitutional aspects of the channelling function was presented at the Conference on Compelling State Interests at the Albany Law School. Another version was presented at a faculty workshop at St. Mary's University School of Law faculty workshop. I am grateful to participants at all these sessions and to Edward H. Cooper, Stephen Gottlieb, Richard O. Lempert, Victoria Mather, Milton C. Regan, Jr., Joseph L. Sax, Kent Syverud, and Carol Weisbrod for their helpful comments.

The paradoxes are familiar. Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases; but cases make law. Law deflects society; but society is reflected in the law.

Karl Llewellyn, *Behind the Law of Divorce*

I. THE THEORY OF THE CHANNELLING FUNCTION

A. *What is the Channelling Function?*

On an occasion such as this, we are called to step back from our daily work to seek what Justice Holmes called a "liberal view" of our subject.¹ Today, I propose to do so by exploring a function of family law that I believe is basic, that underlies much of family law, that resonates with the deepest purposes of culture but that is rarely addressed expressly—namely, what I call the "channelling function." As I will soon explain at length, in the channelling function the law recruits, builds, shapes, sustains, and promotes social institutions.²

My exploration of this topic will have several stages. First, I will define what I mean by "channelling function" and try to convince you that, rightly or wrongly, for good or ill, it has played a weighty role in family law. I will do so because I believe that our failure to recognize the function regularly causes courts and scholars to misunderstand the regulation of families and the work of the law.³ In addi-

1. Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 197 (1920). For an argument for such a view of family law, see Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039 (1985).

2. As the reader will soon see, "channelling" does not fully capture all I mean in talking about the law's role in promoting social institutions and their use. However, I have failed to devise a more precise and equally economic phrase. As the reader may already have noticed, I am not the first to employ the term "channelling function." Lon Fuller memorably used it in describing the functions legal formalities perform. *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941). Fuller, however, was referring to ways in which such formalities offer "channels for the legally effective expression of intention," channels which serve (to change the image) as a language which parties may use to communicate with each other and with judges who might later interpret their communications. *Id.* at 801.

3. For a discussion of how the Supreme Court's failure to comprehend the channelling function's role leads the Court to misunderstand the interests states advance to justify statutes

tion, one of my purposes in this essay is to urge an appreciation of and deference to the complexity of the social and legal world in which we live. The temper of academic thought in recent decades has been to demonstrate the undoubted risks and deficiencies of social institutions. I believe it is now time to remind ourselves that in our painfully and implacably complicated world, there is another side of the ledger.

In the second stage of my paper I will examine some of the factors that constrain the channelling function's effectiveness and moderate its attractions. I will try to show that the function's power is limited, that that power may be used both wisely and foolishly, and that its use exacts costs. Finally, I will seek to make my discussion of the channelling function more concrete by exploring a recent case—*Michael H. v. Gerald D.*⁴—in channelling terms.

But let me begin at the beginning. Family law has, I think, five functions.⁵ The first is the protective function. One of law's most basic duties is to protect citizens against harms done them by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries. Law's second function is to help people organize their lives and affairs in the ways they prefer. Family law performs this "facilitative" function by offering people the law's services in entering and enforcing contracts, by giving legal effect to their private arrangements. Family law's third function is to help people resolve disputes. The law of divorce exemplifies family law's "arbitral" function, since today's divorce courts primarily adjudicate conflicting claims to marital property, alimony, and child custody.

Instinct in each of these first three functions of family law lies a relatively commonplace idea: There are people (particularly children) the law is widely expected to protect, contracts it is widely expected to facilitate, and disputes it is widely expected to arbitrate. However,

against Fourteenth Amendment challenges, see Carl E. Schneider, *State-Interest Analysis and the Channelling Function in Privacy Law*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* (forthcoming, Stephen Gottlieb ed. 1993).

4. 491 U.S. 110 (1989).

5. I discuss these functions at length in CARL E. SCHNEIDER, *FAMILY LAW: CASES AND MATERIALS* (forthcoming). The functions of law which I posit are, of course, primarily analytic constructs. Legislators may not think in terms of them when they write statutes. Nor does any crystalline line divide them. On the contrary, they may often overlap and even conflict. Further, a statute may and often does serve more than one function.

the last two functions of family law are less self-evident and more controversial. The first of these is the expressive function.⁶ It works by deploying the law's power to impart ideas through words and symbols. It has two (related) aspects: Law's expressive abilities may be used, first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses. The ERA exemplifies both aspects. Its proponents had (among other things) two kinds of expressive purposes in mind. They proposed it partly because they wanted the law of their country—their law—to make a symbolic statement about the relationship between men and women. And they also believed that such symbolic statements can promote changes in social sentiment which in turn may promote a reformation of social behavior.

Finally, in the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends. "Social institution" I intend broadly: "In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative."⁷ Social institutions arise, Berger and Luckmann tell us, "whenever there is a reciprocal typification of habitualized actions by types of actors."⁸ Generally, the channelling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channelled into them. As Berger and Luckmann write, "Institutions . . . , by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible."⁹ Or as James Fitzjames Stephen wrote with characteristic vigor and vividness, "The life of the great mass of men, to a great extent the life of all men, is like a watercourse guided this way or

6. Family law's expressive function has recently attracted growing attention. Three exemplary pieces are MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); and Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

7. ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 10 (1991).

8. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 51 (1966).

9. *Id.* at 52.

that by a system of dams, sluices, weirs, and embankments [I]t is by these works—that is to say, by their various customs and institutions—that men's lives are regulated."¹⁰

Business law offers usefully clear examples of such institutions—the corporation and the partnership. Consider the corporation. People have long united to invest in and run businesses. To encourage such activity, governments give legal recognition to a particular business form—the corporation. They also endow it with special advantages—particularly, limited liability and unlimited life. By now, this form has become familiar, natural, and comfortable. It is habitualized, it is institutionalized.

I have used the example of business institutions because the law's role in forming and supporting them and channelling people into them is particularly evident. In addition, it is probably easier for us to appreciate the channelling function in the relatively uncontroversial context of business life. But how might family law be said to support social institutions and to channel people into them? Here we encounter some difficulty. It must always be hard to define any social institution. "Society" has no voice in which to identify and describe its institutions. Lawmakers do not always speak explicitly and exactly about social institutions, even though they may be much concerned for them. Different people would define the same institution in different ways, and the same institution will affect different people differently. What is more, institutional patterns in a modern society are elaborately complex: Any institution will have both normative and behavioral aspects, and behavior within institutions will rarely live up to the institution's normative aspirations. One institution may take many forms, forms which can, further, vary from place to place and can change over time. A single institution can serve competing functions.¹¹ Few if any institutions will be unambivalently and unambiguously embraced, and the multiplicity of social goals may interfere with the nurture of the most warmly embraced institution. An institution may encounter competing and even conflicting institutions.¹² And, worse, there is a sense in which institutions do

10. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 63-64 (1967).

11. "And where functions are many, functions tend to conflict. That portion of the structure which is geared to serve the one is likely to bother the performance of another. In marriage the functions seem to have no end." Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1288 (1932).

12. The institution of marriage, for instance, may have to contend with competing and possibly conflicting institutions like non-marital cohabitation and prostitution.

not "exist," but are merely analytic constructs.¹³

None of this, however, makes it pointless to talk about social institutions. Institutions may be analytic constructs, but those constructs can still be useful attempts to describe patterns of attitudes and behavior. That those patterns will always be complex and those attempts will always be imprecise does not mean that the patterns are not there or that the attempts will be pointless.

One other point about the channelling function needs to be made before we explore specific examples of its use in family law. In one important (if limited) sense, the channelling function is normatively neutral: It can be employed to serve all kinds of normative ends. It has been put to many uses, it could be put to many more. Central to any evaluation of a specific example of the channelling function will be an assessment of the particular goals to which it has been put. To illustrate the workings of the function in family law, I have selected two institutions which I think the law can plausibly be said to use in channelling terms. But there are certainly other ways in which the channelling function has been deployed in family law, and there may well be ways in which it would be better deployed.

Having acknowledged the difficulty and asserted the importance of my enterprise, I will now try to describe two broad social institutions which I will use to illustrate the working of family law's channelling function.¹⁴ These two institutions are "marriage" and "parenthood." These are, obviously, quite broadly defined institutions, and my descriptions of them are thus subject to all the difficulties I described above. I have no doubt that both these institutions have somewhat different meanings for different people, that they have changed over time and are still changing, and that they do not monopolize intimate life in modern America. However, a legislator might plausibly identify a core of ideas which have enough social support to justify the term "institution" and which the legislator might conclude the law should try to support, to shape, and to channel people into.

Our legislator might, then, posit a normative model of "marriage" with several fundamental characteristics. It is monogamous, heterosex-

13. For a thoughtful and suggestive account of some of the often-analogous difficulties of analyzing family law's expressive function, see Weisbrod, *supra* note 6.

14. As I say, I use these institutions for illustrative purposes, not because I endorse them in all their aspects. As I define them, I find much to like in them. But I am not arguing that these definitions state all that we might want from those institutions, that they might not be and have not been defined differently, or that all the means the law uses to promote them are desirable.

ual, and permanent. It rests on love. Husbands and wives are to treat each other affectionately, considerately, and fairly. They should be animated by mutual concern and willing to sacrifice for each other. In short, they ought to assent to the old question: "Wilt thou love her, comfort her, honour, and keep her in sickness and in health; and, forsaking all others, keep thee only unto her, so long as ye both shall live?"¹⁵

Of course, as Karl Llewellyn warned, too much can be "thought and written as if we had a pattern of ways that ma[k]e up marriage."¹⁶ Of course, as Llewellyn knew, "'The' norm is none too uniform."¹⁷ But as he also knew, "major features are observed, are 'recognized,' are made the measure of the 'right.' Right in such matters is most powerfully felt: these are compacted patterns, backed by unreasoning tradition, built around interests that lie deep and close."¹⁸

In the same way, our legislator might posit an institution of "parenthood" with several key normative characteristics. Parents should be married to each other. They are preferably the biological father and mother of their child. They have authority over their children and can make decisions for them. However, like spouses, parents are expected to love their children and to be affectionate, considerate, and fair. They should support and nurture their children during their minority. They should assure them a stable home, particularly by staying married to each other, so that the child lives with both parents and knows the comforts of security.

15. The marriage institution once centrally specified gender roles. To an uncertain but surely significant extent, those roles retain a good deal of social power. However, I do not include them as part of our legislator's channelling program for two reasons. First, they have lost an important part of their social force. Too many people wholly and explicitly reject them, and too many more at least partially and implicitly do so. Second, the law now professes to have rejected those roles. The Supreme Court has overturned gender distinctions in family law, e.g., *Orr v. Orr*, 440 U.S. 268 (1979), and has condemned them in a variety of other situations, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973). Further, a good deal of legislative and judicial reform of family-law areas like child custody, alimony, and marital property has attempted to establish gender-neutral rules. Legal efforts along these lines may be incomplete, unsatisfactory, and even counter-productive, but they are substantial enough to make it hard to see the maintenance of traditional gender roles as a plausible or, I would suppose, desirable legislative goal.

16. Llewellyn, *supra* note 11, at 1285. Or as Ruth Dixon puts the point: "Most cultures have a certain notional family form that is regarded as the norm, but even when this is the most common form, there will inevitably be many variants." *THE ROMAN FAMILY* 11 (1992).

17. Llewellyn, *supra* note 11, at 1286.

18. *Id.*

Obviously, these two normative models are not and never were descriptions of any universal empirical reality, and I will soon examine recent changes in social practice that might affect them. Nor are they the only models the channelling function might be recruited to serve. Nevertheless, they do describe ideals which have won and retained substantial allegiance in American life. I will thus use these models to illustrate how the channelling function can work. How, then, might our legislator interpret the law as supporting these two institutions and channelling people into them?

Our legislator might see family law as setting a framework of rules, one of whose effects is to shape, sponsor, and sustain the model of marriage I described above: It writes standards for entry into marriage, standards which prohibit polygamous, incestuous, and homosexual unions. It seeks to encourage marital stability by inhibiting divorce (although it pursues this goal much less vigorously than it once did). It tries to improve marital behavior both directly and indirectly: It imposes a few direct obligations during marriage, like the duty of support. Less directly, it has invented special categories of property (like estates by the entirety and rights of dower and curtesy) to reflect and reinforce the special relationship of marriage. It indirectly sets some standards for marital behavior through the law of divorce. Fault-based divorce does so by describing behavior so egregious that it justifies divorce. Marital-property law implicitly sets standards for the financial conduct of spouses. Finally, prohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements in principle confine sexual life to marriage. "What is all this," James Fitzjames Stephen emphatically asked, "except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society?"¹⁹

Similarly, our legislator might see a framework of laws molding and promoting the institution of parenthood. Laws criminalizing fornication, cohabitation, adultery, and bigamy in principle limit parenthood to married couples, and those legal disadvantages that still attach to illegitimacy make it wise to confine parenthood to marriage. Laws restricting divorce make it likelier that a child will be raised by both parents. The law buttresses parents' authority over children. Parents may use reasonable force in disciplining their children. They

19. STEPHEN, *supra* note 10, at 156.

may decide whether their children should have medical treatment. They may choose their child's school. Parents of "children in need of supervision" can summon up the state's coercive power. However, the law also tries, directly and indirectly, to shape parental behavior. It requires parents to support their children. It penalizes the "abuse" or "neglect" of children and obliges many kinds of people to report evidence of it. It obliges parents to send their children to school. Custody law obliquely sets standards for parental behavior and emphasizes the centrality of children's interests. Finally, some states further elaborate the relationship between parent and child by obliging adult children to support their indigent parents.

These sketches suggest how the law can be seen as performing the first task of the channelling function, namely, to create—or more often, to recruit—social institutions and to mold and sustain them. The function's second task is to channel people into institutions. It can perform these two tasks in several ways. First, it does so simply by recognizing and endorsing institutions, thus giving them some aura of legitimacy and permanence. Recognition may be extended, for instance, through formalized, routinized, and regulated entry and exit to an institution, as with marriage: "By the authority vested in me by the State of Michigan, I now pronounce you man and wife."

A second channelling technique is to reward participation in an institution. Tax law, for instance, may offer advantages—like the marital deduction—to married couples that it denies the unmarried. Similarly, Social Security offers spouses benefits it refuses lovers. These advantages are enhanced if private entities consult the legal institution in allocating benefits, as when private employers offer medical insurance only to "family members" as the law defines that term. In a somewhat different vein, the law of alimony and marital property offers spouses—but generally not "cohabitants"—protections on divorce.

Third, the law can channel by disfavoring competing institutions. Sometimes competitors are flatly outlawed, as by laws prohibiting sodomy, bigamy, adultery, and prostitution. Bans on fornication and cohabitation mean (in principle) that, to have sexual relations, one must marry. Sometimes competing institutions are merely disadvantaged. For instance, the rule making contracts for meretricious consideration unenforceable traditionally denied unmarried couples the law's help in resolving some disputes. Similarly, non-parents are presump-

tively disadvantaged in custody disputes with parents.²⁰ Finally, restrictive divorce laws impede re-entry to the alternative institution of singleness.

Fourth, in principle people can be channelled into an institution by directly penalizing its non-use. One might, for instance, say that school taxes penalize childlessness, since non-parents get a good deal less out of those taxes than parents. However, the weakness of this example suggests the difficulty of finding really good instances in American law of direct penalties for not marrying or not having children.

By and large, then, the channelling function does not primarily use direct legal coercion. People are not forced to marry. One can contract out (formally or informally) of many of the rules underlying marriage. One need not have children, and one is not forced to treat them lovingly. Rather, the function forms and reinforces institutions which have significant social support and which, optimally, come to seem so natural that people use them almost unreflectively. It relies centrally but not exclusively on social approval of the institution, on social rewards for its use, and on social disfavor of its alternatives. Some aspects of it may be highly legalized, as divorce is. Some alternatives may, at least formally, be legally prohibited. The law may buttress an institution here and harry its competitors there. But, Berger and Luckmann explain, "the primary social control is given in the existence of an institution as such Additional control mechanisms are required only insofar as the processes of institutionalization are less than completely successful."²¹ They suggest "institutions are *there*, external to [the individual], persistent in their reality They have coercive power over him, both in themselves, by the sheer force of their facticity, and through the control mechanisms that are usually attached to the most important of them."²² And as Llewellyn, thinking more particularly about marriage, wrote, "One vital element in the fact-pattern thus made right is (this needs repetition) its recognition by the group [O]nce conceived, once accepted, the oversimple norm-concept maintains itself stubbornly, despite all changes in conditions; it becomes the socially given, right, ideal-type of

20. As the reader will have noticed, it can sometimes be hard to tell the difference between channelling by advantaging an institution and channelling by disadvantaging its competitors.

21. BERGER & LUCKMANN, *supra* note 8, at 52.

22. *Id.* at 57 (emphasis in original).

'marriage': the *connubium honestum* of the *vir honestus*."²³ In short, as Philip Rieff observes, "[A] culture survives principally . . . by the power of its institutions to bind and loose men in the conduct of their affairs with reasons which sink so deep into the self that they become common and implicitly understood"²⁴ Channelling's reliance on social institutions, then, is both its strength and its weakness, its harshness and its gentleness, its importance and its peril.

B. *What Purposes Does the Channelling Function Serve?*

The channelling function, I have said, fosters social institutions and channels people into them. But why might the state want to do so? To answer that question, let us revisit the example of the corporation as a "channelling" institution. First, the corporation serves law's three core functions. For example, it serves the protective function by allowing people to invest in enterprises without risking their whole fortunes, by protecting minority shareholders, and by directing economic activity into an institution whose public nature makes it easier to regulate. The corporation serves the facilitative function by giving people a convenient and efficient way of organizing themselves into enterprises. It serves the arbitral function by providing mechanisms for resolving disputes among entrepreneurs and for winding up their affairs.

But the corporate form does more than promote law's core functions. More centrally and obviously, it serves some broad social purposes. Primarily, it promotes the accumulation of large agglomerations of capital and the organization of many people into a single and productive enterprise. In other words, the corporate form makes possible the extensive and complex economic institutions on which rest industrialization, social wealth, and modernity. Less grandly, more specifically, and more subtly, the corporation serves what might be called "efficiency" functions. For instance, it relieves prospective entrepreneurs of the need to figure out *de novo* how to organize their ventures. Much of that work will already have been done by earlier generations and been embodied in the corporate form and in the law, literature, and lore that surround it. Because that form is neither monolithic nor exclusive, entrepreneurs will have important choices to make and considerable flexibility in making them. But the energy

23. Llewellyn, *supra* note 11, at 1286.

24. PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 2 (1966).

they must expend is diminished by the menu of well-developed standard alternatives among which to choose.

In addition, the corporate form makes the world more predictable for everyone. When investors, regulators, employees, creditors, debtors, vendors, and customers encounter a corporation, they essentially know how it is organized and what it can and cannot do. A creditor, for example, realizes that, unlike a partnership, a corporation's liability is limited to its own assets. And so on. Because people have established expectations about corporations they need expend less effort to understand an enterprise. This not only saves them time and trouble, but may make them more willing to join in or deal with the enterprise. In short, both the corporation and those who deal with it benefit from the existence of a well-known, time-tested, socially-accepted, and governmentally-supported economic institution.

Similarly, family law's channelling function is partly a specialized way of performing its protective, facilitative, and arbitral functions. For instance, marriage variously serves the protective function. Law does not just (in conjunction with other social forces) create a shell of an institution; it builds (again with much help) institutions with norms. The institution of marriage which the law recruits and shapes attempts to induce in spouses a sense of an obligation to treat each other well—to love and honor each other. At the elemental level of physical violence, the law has tried to reinforce this socially imposed obligation by making cruelty a ground for divorce, by taking cruelty into account in settling the spouses' economic affairs, and by criminalizing and (increasingly aggressively in some jurisdictions) prosecuting spouse abuse. At the level of economic life, the law has tried to supervise the fairness of antenuptial agreements and the distribution of the spouses' assets on divorce. And marriage protects children by making it likelier that both parents will care for them throughout their minority.²⁵

25. As Llewellyn wrote:

In regard, then, to violence, aggression, brutality, irresponsibility, fraud, protection of children or of aging women, and the like, rules of law and official action seem to play much the same role in marriage matters as in others: they are available, in organized form, to reinforce the less compacted but largely parallel social patterns in cases where these latter might fail, and where their failure might tend toward gradual disintegration. In regard to making marital obligations look real, and so be felt, the same.

Llewellyn, *supra* note 11, at 1306. Freud put the point on a grander, bleaker, scale:

[I]nstinctual passions are stronger than reasonable interests. Civilization has to use its utmost efforts in order to set limits to man's aggressive instincts and to hold

The channelling function also assists the facilitative function. The latter function furnishes people mechanisms that help them organize their lives and affairs as they wish. Family law's institutions offer people models for organizing their lives. These models have been developed over time and have presumably worked for many other people. They become part of a menu of social choice. Further, marriage offers people a kind of relationship with social and legal advantages which are primarily available precisely because the law gives marriage a special status. Finally, marriage serves the dispute-resolution function by providing rules and a forum in which to adjudicate the disputes which flock around divorce like remoras around a shark. In addition, it provides norms of behavior which may help the parties resolve some of their disputes privately.

But the channelling function is more than a specialized means of performing family law's other functions. Like the corporation, marriage and parenthood serve some broad social purposes. These are crucial, but they are also so familiar they hardly need elaboration. Sixty years ago Karl Llewellyn discerned thirteen such purposes in marriage. They included the regulation of sexual behavior, the reduction of sexual conflict, the orderly perpetuation of the species, the "building and reinforcement of an economic unit," the regulation of wealth, and the "development of individual personality."²⁶ And a large body of writing argues that the present happiness and future well-being of children depend on their growing up in something like the kind of institution I described above.²⁷

Less grandly, more specifically, and more interestingly, the institutions of the family also serve what I earlier called "efficiency" functions (but that might in this warmer context be called ways of

the manifestations of them in check by psychical reaction-formations. Hence, therefore, the use of methods intended to incite people into identifications and aim-inhibited relationships of love, hence the restriction upon sexual life, and hence too the ideal's commandment to love one's neighbour as oneself

SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 59 (1961).

26. Llewellyn, *supra* note 11, at 1288-95.

27. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 109-44 (1991); DAVID POPENOE, *DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES* (1988); WHEN FAMILIES FAIL THE SOCIAL COSTS (Bryce J. Christensen ed., 1991); Deborah A. Dawson, *Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, 53 J. MARRIAGE & FAM. 573 (1991); William A. Galston, *A Liberal-Democratic Case for the Family*, 1 RESPONSIVE COMMUNITY 14 (1990/91); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1.

easing social life). First, channelling's institutions spare people having to invent the forms of family life *de novo*. Imagine two nineteen-year-olds living in a state of nature who find themselves in love. Without established social institutions, they would have to work out afresh how to express that love, how to structure their relationship, and what to expect of each other. The same couple in, say, the United States of the mid-twentieth century would find a set of answers to those questions in the institution of marriage. To be sure, they would see other answers presented by other institutions. They would hear criticisms of marriage. They would not be compelled to marry. But marriage would seem natural to them because most of the adults they knew partook of it, because society and the law supported it, and because they had to some extent internalized its values. As one sociologist remarks, "When people make decisions, they tend to look not to a mathematical formula to determine what is to their best advantage, but to what others do, to what they have traditionally done, or to what they think others think they ought to do."²⁸ The institution, that is, would be part of a comfortable social vocabulary, a vocabulary that would save our lovers from having to invent their own language.

In short, as Berger and Luckmann observe, "Habitualization carries with it the important psychological gain that choices are narrowed."²⁹ As Whitehead memorably put it:

It is a profoundly erroneous truism, repeated by all copybooks and by eminent people when they are making speeches, that we should cultivate the habit of thinking of what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.³⁰

Of course, this is not to say that cavalry charges are never necessary, that operations of thought are always to be avoided. Quite the contrary. As Berger and Luckman note, habitualization, "by providing a stable background in which human activity may proceed with a mini-

28. ALAN WOLFE, *WHOSE KEEPER?: SOCIAL SCIENCE AND MORAL OBLIGATION* 43 (1989).

29. BERGER & LUCKMANN, *supra* note 8, at 50-51.

30. ALFRED NORTH WHITEHEAD, *AN INTRODUCTION TO MATHEMATICS* 41-42 (Oxford University Press 1948) (1911).

num of decision-making most of the time . . . frees energy for such decisions as may be necessary on certain occasions. In other words, the background of habitualized activity opens up a foreground for deliberation and innovation."³¹

The channelling function does not just relieve people of the burden of working out afresh how to organize their lives. Even if one could satisfactorily invent modes of living for oneself, they probably could not be lived alone, but would have to be lived with others. People need to understand and predict what other people will think and do so that they can readily and safely deal and cooperate with each other. Social institutions help serve that need. As Martin Krygier writes, "There are many social situations where our decisions are strategically interdependent [with the decisions of other people] [I]n such situations, *norms* will be generated which provide 'some anchorage; some preeminently conspicuous indication as to what action is likely to be taken by (most of) the others'"³² Social institutions and the norms they embody, then, help us count on, cope with, and cooperate with other people.

More concretely, for example, the institution of marriage helps people to plan for the future even before becoming engaged and to reach easier understandings with their fiancés and spouses about their married lives. People dealing with married couples benefit as well. Mundanely, they know that when they say, "Can you come for dinner on the sixteenth?" the invitation will be taken as including both husband and wife. Less banally and more consequentially, a wedding ring warns anyone attracted to its wearer not to contemplate an intimate relationship.

The kind of "anchorage" of which Krygier speaks may be particularly important to families, for in the complex and long-term intimate relationships that characterize family life, reliance and trust are specially needed. A central source of that reliance and trust is of course a faith in the love and steadfastness of one's family members. But that faith may be more comfortably sustained, and reciprocating love more easily given, where personal feelings are reinforced (and known to be reinforced) by social institutions. As Norval Glenn suggests, even people "who still strongly adhere to the ideal of marital

31. BERGER & LUCKMANN, *supra* note 8, at 51.

32. *Law as Tradition*, 5 LAW & PHIL. 237, 258-59 (1986) (emphasis in original). For an extended study of the problem of norms, coordination, and cooperation, see JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989).

permanence may be afraid to commit strongly to their marriages if they perceive a general weakening of the ideal."³³

The advantages of institutions in family life are illuminated by situations in which institutions are absent. Andrew Cherlin, for instance, describes the discomfort and even distress of remarried adults and their children whose

day to day life includes many problems for which there are no institutionalized solutions. These problems can range from deciding what a stepchild should call his or her stepparent, to resolving the sexual tensions that can emerge between step-relatives in the absence of a well-defined incest taboo, to defining the financial obligations of husbands to their spouses and children from current and previous marriages.³⁴

Nor are these institutional deficits easily overcome. David Chambers writes that "the relationship between many stepparents and stepchildren remains unclear and uncomfortable well beyond the initial stages."³⁵ Indeed, Cherlin argues that "the higher divorce rate for remarriages after divorce is a consequence of the incomplete institutionalization of remarriage after divorce in our society."³⁶ He notes that because institutionalized solutions for the special problems of reconstituted families have not emerged, "there is more opportunity for disagreements and divisions among family members and more strain in many remarriages after divorce."³⁷

I have been arguing, then, that social institutions serve what I have wryly called "efficiency" functions. That is, they relieve us of

33. Norval D. Glenn, *The Recent Trend in Marital Success in the United States*, 53 J. MARRIAGE & FAM. 261, 269 (1991).

34. ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 87-88 (1981).

35. David L. Chambers, *Stepparents, Parents, "Family" After Divorce*, in DIVORCE REFORM AT THE CROSSROADS 102, 106 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

36. Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AM. J. SOC. 634, 636 (1978).

37. *Id.* The authors of one of the most extensive studies of attitudes toward sexual morality suggest another way in which weakened institutions may present difficulties:

At odds with the traditional external sources of moral norms but with a pragmatic need to orient themselves within a system of moral meanings, some Americans have sought to construct their own moralities from a variety of available resources—Freudian psychology, Eastern religions, the human potential movement, and so on. These new moralities have often been disappointing, however. Lacking institutional support, they hardly restrain in any way and seem inchoate; being overly intellectualized, they often have little practical relevance.

ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S. 277 (1989).

the burden of working out from scratch the forms of family life, and they ease our relations with families, friends, and acquaintances. Social institutions serve at least one more such function—they help integrate members of society over time and place. A crucial problem of living in a large, modern, diverse, industrial society is that we need to be concerned for people we can never know. The reasons for this need can be stated accurately enough in terms of principle. But such abstract statements, however convincing they may logically be, commonly lack the persuasive force to compel people to act. For people to be moved to help each other, they need some sense of commonality with them—some sense that their fellow citizens are people like themselves, whose experiences, concerns, and interests they can at least understand and to some degree share. Social institutions help provide such a sense. Obviously this element of commonality cannot be pushed too far, lest the benefits of living in a modern and diverse society be lost. Yet without some degree of commonality, we lose the practical basis for the private philanthropy and public programs, the commitment to a shared enterprise, the willingness to cooperate in it and to sacrifice for it, that make such a society possible and decent.

Similarly, social institutions link us both to the past and the future. The knowledge that our forebears organized their lives around the social institutions that still shape us and the belief that the lives of our progeny will be made recognizable by their participation in those same institutions add meaning to our lives and help inspire us as individuals and as members of society to cherish the past and our elders and to nurture the future and our children.

We can summarize these workings of the channelling function by imagining two people looking for recreation, who live in a world without tennis, and who are given three balls, two rackets, and one net. They could no doubt find some way of amusing themselves with these toys. But tennis is a good game partly because it developed over many centuries, and our couple could not easily invent as good a game. Further, where tennis is a social institution, the two will readily find people with whom to enjoy their recreation, to improve their game, to relish their successes, and to lament their failures. And part of the pleasure of tennis lies in knowing its past glories and following its current progress. Tennis, in other words, succeeds because it is a shared and well-established social institution. Marriage and parenthood benefit from that same fact.

Let me conclude what I have said in this section and prepare the

way for what I will say in the next by calling again on Karl Llewellyn, who wrote:

Such are the functions of the social institution, in our civilization. Little about the set-up is inevitable. Costs which go here unnoted are bitterly high. In no point is the institution adequate in performance, nor it is always the major factor in such performance as obtains. Any one of the functions could be, at some time or place has been, is now in part, served powerfully in other ways. Few indeed are the cases in which marriage alone is halfway adequate to any of them But would one for that deny vitality to the work . . . which marriage does?³⁸

II. PROBING THE CHANNELLING FUNCTION

So far, I have tried to describe how the channelling function works in principle and what broad social purposes it may serve. But like all family law's functions, like family law itself, the channelling function is hedged about by constraints and limitations. I think it will seem to some people that those constraints and limitations are so great as to make the channelling function merely futile or even actively undesirable. Much will depend, as I have said before, on just which social institutions the channelling function is recruited to promote. I cannot here fully evaluate the channelling function in all its possible incarnations, if only because doing so would raise large and perhaps unresolvable questions about autonomy, pluralism, community, and empirical reality. Nevertheless, I will use this section to provide two additional perspectives on the channelling function. First, I will examine the function's limitations and the costs its use imposes. Second, I will analyze a recent case—*Michael H. v. Gerald D.*³⁹—in channelling terms.

A. *Limitations of the Channelling Function*

One limitation of the channelling function is that the state can rarely create a social institution *de novo*. Thus the channelling function can usually be deployed successfully only where social institution already exists. Nor can the state always bend an available institution to its purpose: As James Fitzjames Stephen said, "Legislation ought in all cases to be graduated to the existing level of morals in the time

38. Llewellyn, *supra* note 11, at 1295-96.

39. 491 U.S. 110 (1989).

and country in which it is employed Law cannot be better than the nation in which it exists, though it may and can protect an acknowledged moral standard, and may gradually be increased in strictness as the standard rises."⁴⁰ Furthermore, channelling primarily works, as I have suggested, obliquely and interstitially. That is, it does not set all the terms of behavior within an institution, but rather creates a system of incentives and disincentives that touch participants only in places, not globally. Even those incentives may operate so softly and subtly that many people are quite unaware of or indifferent to them.⁴¹ In short, because channelling often uses only indirect and moderate force, because it leaves so much to individual choice and to social rather than legal pressure, its power and utility are limited.

In the last few decades, family law has been transformed,⁴² and perhaps the family has too. It is often said that families increasingly live in non-traditional arrangements and that even when they don't their internal relations have vitally changed. Arland Thornton, for instance sees a "decreased emphasis upon conformity to a set of behavioral standards in the family arena and an increased emphasis on individual freedom"⁴³ In recent decades, more specifically, the divorce rate has risen impressively. There are more unmarried cohabitants. Non-marital sexual activity has increased. Homosexuality has lost some of its stigma. Single parents are more numerous. More broadly, one hears that families "are becoming internally deinstitutionalized, that is, their individual members are more autonomous and less bound by the group[,] and the domestic group as a whole is less cohesive Examples of this are the decline of economic interdependence between husband and wife and the weakening of parental authority over children."⁴⁴ Are these changes so ex-

40. STEPHEN, *supra* note 10, at 159-60.

41. On influencing marital behavior through legal incentives, see Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 203-09.

42. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

43. Arland Thornton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873, 889 (1989).

44. POPENOE, *supra* note 27, at 8. Not only may it be argued that the power of social institutions to structure American family life has weakened. It is also said that the power of American social institutions is generally weak:

Culture in America, especially when compared to more ethnically homogeneous societies, is not especially strong in its binding capacity American culture is uncomfortable with bipolar dichotomies, strict standards, and sharp boundaries. It is not a Durkheimian morality standing above utilitarian individualism with disapprov-

tensive that the family has become wholly "deinstitutionalized"? Has it grown unreasonable to speak of the family in terms of social institutions? Has the channelling function thus been put out of business in family law?

Certainly family law has changed. "No-fault" divorce is now everywhere available, which both makes it easier to leave marriages and inhibits setting norms for marital behavior. Prohibitions on non-marital sexual activity have largely been repealed, found unconstitutional, or fallen into desuetude. Laws disadvantaging illegitimate children have yielded to dissatisfied legislatures and courts. There has been some (partial) movement toward the "atomizing" of family law, toward seeing people not as family members, but rather as individuals dealing with other individuals.⁴⁵ As Justice Brennan wrote in a telling and often retold phrase, "[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free . . . to bear or beget a child."⁴⁶ By 1989, Justice Brennan could cite a string of cases he believed indicated that "we have declined to respect a State's notion, as manifested in its allocation of privileges and burdens, of what the family should be."⁴⁷

One noteworthy feature of recent legal change is the occasional governmental recognition of "functional equivalents" of the family. Perhaps the best-known instance is *Marvin v. Marvin*.⁴⁸ There, the California Supreme Court invited cohabitants to arrange their affairs contractually and to invoke a broad set of equitable doctrines.⁴⁹ *Marvin* may thus have given cohabitants some marriage-like protections. *Braschi v. Stahl Associates, Co.*⁵⁰ held that a homosexual couple could be a "family" within the meaning of the New York City Rent and Eviction Regulations.⁵¹ In *Moore v. City of East*

ing powers, but rather an all-forgiving, undemanding, and affirming mechanism of reinforcement.

WOLFE, *supra* note 28, at 94.

45. See, e.g., Hafen, *supra* note 27; Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989); Schneider, *supra* note 42.

46. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

47. Michael H. v. Gerald D., 491 U.S. 110, 136 (Brennan, J., dissenting).

48. 557 P.2d 106 (Ca. 1976).

49. Interestingly, there is some evidence that, after an initial flurry, that invitation has not been widely accepted.

50. 543 N.E.2d 49 (N.Y. 1989).

51. *Id.* at 53-54. Or consider Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990). Glassboro had a zoning ordinance limiting homes in residential districts to occupancy by "families" and defining a family as "one or more persons occupying a dwelling unit as a single non-profit housekeeping unit, who are living together as a stable and permanent living

Cleveland,⁵² the United States Supreme Court decided that a grandmother living with a son and two grandchildren, one of whom was not the son's child, were a "family" for purposes of a constitutional challenge to a zoning ordinance. And in *Smith v. OFFER*,⁵³ the Court intimated that people employed by the state as foster parents might acquire a "parental" interest in their foster children strong enough to give them some of the constitutional rights of natural parents. To like effect are the occasional "domestic partner" ordinances and regulations which seek to give spouse-like benefits to unmarried cohabitants.⁵⁴

Can the channelling function have any role in our changed new world? I believe so. I suspect that the larger purposes the channelling function serves are still important, even if the specific institutions the function promotes may be altered somewhat. But in order to build an *a fortiori* case, let me revert to the two institutions I have used as examples—"marriage" and "parenthood." I will readily grant that these institutions may well have changed in recent decades. But I will suggest reasons to doubt that even in the rather traditional terms in which I have described those institutions, they can be dismissed as objects of the channelling function. Much less, then, can it be said that the family has been so thoroughly deinstitutionalized that the channelling function has become irrelevant.

unit, being a traditional family unit or the function equivalency [sic] thereof." *Id.* at 889 (quoting GLASSBORO, N.J., CODE § 107-3 (1986)). Each of ten college students entered into a four-month lease on a house in such a district. The leases were renewable for a further term if the house was "in order" at the end of the preceding term. The New Jersey court upheld the trial court's conclusion that the students were a family within the meaning of the ordinance: "The students ate together, shared household chores, and paid expenses from a common fund." *Id.* at 894. (The court noted that during the appeal, and two years after the house had first been rented, the principal renter withdrew from school and "the use of the home by the students ended." *Id.* at 891. The court nevertheless decided the case "because of the important issues presented." *Id.*)

52. 431 U.S. 494 (1977).

53. 431 U.S. 816 (1977). On changing definitions of "parenthood" in the child-custody context, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

54. *E.g.*, ANN ARBOR, MICH., CODE, Title IX, ch. 110 (1991); Berkeley, Cal., Resolution No. 56,106 (Sept. 24, 1991); ITHACA, N.Y., CODE, ch. 7 (1990); LAGUNA BEACH, CAL., CODE, ch. 1.12 (1992); MADISON, WIS., CODE, § 3.23 (1990); SEATTLE, WASH., CODE, ch. 4.30 (1989); WASHINGTON, D.C., CODE, § 36-1401 (1992); *see also* Memorandum of Understanding between the City of Los Angeles and The All City Employees Assoc., June 24, 1991; Memorandum of Understanding between the City of Santa Cruz and City of Santa Cruz Service Employees, § 15 (1992).

First, the world may not have changed quite so much and so simply as people—and courts—sometimes seem, rather casually, to assume. Social change is as monolithic and complete as we perceive it to be. The restructuring of family life may be no exception to that rule, for example, as early as 1964, that barometer of the conventional wisdom—the cover of *Time* magazine—announced that America had undergone a “sexual revolution.”⁵⁵ This revolution has ever since been widely taken as having the most thoroughgoing proportions. But one particularly extensive and careful study of sexual attitudes conducted as late as 1970 concluded: “We have doubts that such a revolution occurred.”⁵⁶ That study’s data demonstrated

one striking fact: with regard to many forms of sexual expression, our respondents were extremely conservative. A majority disapproved of homosexuality, prostitution, extramarital sex, and most forms of premarital sex. Furthermore, except for masturbation and for premarital sex between people who are in love, our data suggest that a majority of Americans are “moral absolutists” in that they see these behaviors as *always* wrong.⁵⁷

A more recent student concluded that the changes in sexual attitudes over the last several decades

hardly amount to a Sexual Revolution. They are both smaller and more nuanced than aptly fits a revolutionary characterization Notable increases in approval of premarital sex (including cohabitation), sex education, and birth control did occur over the last generation. However, at least since the early 1970s there appears to have been no liberal shift, and even some conservative movement, in attitudes on homosexuality, extra-marital sex, and pornography.⁵⁸

Or take another example of the excessive simplicity of our impressions of social change. People commonly assume that “the fami-

55. Tom W. Smith, *The Polls—A Report: The Sexual Revolution?*, 54 PUB. OPINION Q. 415, 415 (1990).

56. KLASSEN ET AL., *supra* note 37, at 4 (although the survey was published in 1989, it was conducted in 1970).

57. *Id.* at 17 (parenthetical information omitted).

58. Smith, *supra* note 55, at 419. More specifically, Smith notes, for instance, that “[d]isapproval of extramarital sex was strong and stable from 1970 to 1987 and then showed a conservative shift in 1988 and 1989” *Id.* at 417. This disapproval may be reflected in behavior: “Among all adults 86 percent were monogamous . . . , while among the sexually active 82 percent were monogamous” Andrew M. Greeley et al., *Americans and Their Sexual Partners*, 27 SOCIETY 36, 37 (1990) (Greeley defined “monogamous” as having only one or no sexual partner within the past year).

ly" is in a state of collapse, or at least lamentable disrepair. Yet, as David Popenoe notes, the "current view of many leading sociologists [is] that the family has not declined."⁵⁹ Thus a recent contribution to the Middletown project looked at changes from the 1920s to the 1970s and "discovered increased family solidarity, a smaller generation gap, closer marital communication, more religion, and less mobility."⁶⁰

I am not arguing that society has not changed. Rather, I am suggesting that we should be much more cautious than we usually are in approaching claims of radical social change and much more alive to the complexity and unscrutability of social life. For one thing, data are absurdly hard to acquire and analyze.⁶¹ For another, social change is too often "proved" by arguments that the number of people doing something has increased by a large percentage. But the size of the percentage may be misleading where, as often happens, only a few people were involved at the first point in time.⁶² For yet another thing, it can be extremely difficult to distinguish short-term trends from genuine secular change. Further, impressions of social change are easily distorted. Both journalists and scholars, for instance, are more beguiled by the thrilling heterodox than the boring orthodox.⁶³ And, for instance, we too easily see the behavior of our own class as typical of the country at large.⁶⁴

59. POPENOE, *supra* note 27, at 11. Professor Popenoe, it should be said, argues illuminatingly that those sociologists are wrong.

60. THEODORE CAPLOW ET AL., *MIDDLETOWN FAMILIES: FIFTY YEARS OF CHANGE AND CONTINUITY* 323 (1982). Further, it is possible to see American family law as:

in some ways . . . surprisingly resistant to the pressures of cultural fragmentation [T]he Supreme Court has not yet extended the concept of constitutional privacy to include sexual relations between unmarried adults [T]he Court . . . does not give preferred constitutional status to relationships between unmarried partners [N]o state yet recognizes the legality of homosexual marriage [S]tate laws that define the term "family" have remained relatively stable. The rights of children and spouses under inheritance, tax, and wrongful death laws are confined to relationships based on marriage and/or kinship. Even the famous Lee Marvin "palimony" case in California was based on a contract theory, because the California Supreme Court did not equate cohabitation with marriage and it viewed the state's family law code as inapplicable.

Hafen, *supra* note 27, at 6-7 (footnote omitted).

61. For helpfully cautionary general comments, see CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* (1979).

62. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 109 n.1 (1976).

63. For an analysis of one example of this tendency, see David Blankenhorn, *Ozzie and Harriet: Have Reports of Their Death Been Greatly Exaggerated?*, 2 FAM. AFF. 10 (1989).

64. For a more fully developed exposition of these arguments, see Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the*

Even if social behavior has changed dramatically, social norms may not have. Even if, for example, families less often consist of a married couple and their biological offspring, that grouping may still represent a powerful cultural norm. Or, to take another example, it is often observed that "[m]ost divorced people remarry, usually soon after their divorces, suggesting that their divorce experience could be interpreted more as dissatisfaction with a specific spouse than as rejection of marriage as an institution."⁶⁵ Further, many of the specific norms respecting marriage and parenthood could change without destroying their core institutional principles. I am not suggesting that there have been no changes in social attitudes about the family or in family life. But it seems to me quite possible that the social institutions I described earlier may still retain the social strength necessary to the channelling function even if they have changed in some respects and are statistically less common.⁶⁶

Even if social behavior and social norms are changing, will they continue to do so? Might they even reverse their course? As I once wrote, our views are "skewed by the unexamined assumption that change in social behavior (particularly change in family law matters) is unidirectional—that change will always liberalize social rules. Historically, . . . this has not been true."⁶⁷ And even if behavior and

Constitutionalization of Social Issues, 51 LAW & CONTEMP. PROBS. 79, 108-10 (1988).

65. Arland Thornton & Deborah Freedman, *Changing Attitudes Toward Marriage and Single Life*, 14 FAM. PLAN. PERSP. 297, 298 (1982) (footnote omitted). Thornton and Freeman also report evidence that "[w]hile there has been a general reevaluation of marriage relative to single life, these data do not indicate a rejection of marriage in the United States." *Id.* at 299. That evidence included, for example, a survey of eighteen-year-olds in 1980. "Over 90 percent of those still single said they expected to marry, while only three percent thought they would not." *Id.* (Thornton and Freedman note that "the expectations of these young people accord with the actual marital experience of earlier cohorts." *Id.* at 300.) More recently, Thornton reports that while people tend to view marriage more negatively than they did a few decades ago, "there was no strong movement toward wanting to remain single. Thornton, *supra* note 43, at 878. He also notes that while premarital sex and cohabitation are markedly less censured than before, "fidelity within relationships may have become more valued since the middle 1970s." *Id.* at 889.

66. Cf. Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967):

[N]orms do not necessarily atrophy through disuse. Standards of charity, mercy, and justice may be dishonored every day yet remain important statements of what is publicly approved as virtue. The sexual behavior of the human male and the human female need not be a copy of the socially sanctioned rules. Those rules remain as important affirmations of an acceptable code, even though they are regularly breached.

Id. at 179.

67. Schneider, *supra* note 64, at 107. "History provides almost as many examples of

norms are changing in some places, they may not be in others. As I wrote, "[D]espite the many forces that impel the United States as a whole toward [social] dissensus, there are probably still states and even regions in which traditional social norms are widely accepted."⁶⁸

Finally, even if behavior and norms are changing, society might wish to alter the direction of change. To be sure, any such attempt might be problematically overambitious. But there are inherent limits on a government's willingness and ability make the channelling function work despite an inadequate social basis for it. Without that basis, any such effort would have difficulty garnering the legislative will, the executive energy, or the popular support necessary to make it work.

In sum, the channelling function's reach is always limited by the degree of social support the function's institutions receive. Today, "marriage" and "parenthood" appear to be changing institutions, and they appear to be under more pressure than they have been in recent memory. But this may mean no more than that these institutions are continuing to develop as they have been developing for centuries. That they are developing does not mean that their normative core will disappear. And even if it does, it seems likely that new institutions will have been created, so that the channelling function will continue to do its work. In short, I doubt that so far, at least, the American family has become so deinstitutionalized that the channelling function is no longer useful or relevant to family law. But this does not mean, of course, that every use of the function is justifiable. What is needed, rather, is to ask case by case whether the channelling function can plausibly be said to work effectively.

A second limitation of the channelling function is that its technique of promoting one institution by disadvantaging the alternatives can be troubling. Where the alternative is immoral and socially harmful, this concern is, to be sure, much tempered. Originally many alternative institutions—polygamy, adultery, fornication, and homo-

retreats from permissiveness as of abandoned proscriptions." RICHARD S. RANDALL, *FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED* 137 (1989).

68. Schneider, *supra* note 64, 107-08; see also KLASSEN ET AL., *supra* note 37, whose findings cast "doubt on those theories claiming that America is becoming generally liberalized through increased education and the spread of mass communications, and that a singularly liberal sexual ethic, a generally liberal one, will emerge." *Id.* at 38. Klassen et al., conclude that "factors such as region, locality, and religion remain important forces in sustaining sexual norms and attitudes regardless of their direction." *Id.* at 267.

sexuality, for instance—were generally condemned on these grounds. Thus it was considered fair not just to disadvantage them, but to criminalize them. As views on at least some of those subjects have changed, that response looks less satisfactory. But the problem is broader. Even if unmarried cohabitation, for example, is immoral; should it be discouraged by denying its practitioners the law's services in resolving their disputes? Doing so may in practice allow one miscreant actually to profit by taking advantage of another. And in at least one situation—illegitimacy—those who suffered most from the channelling function's operation—illegitimate children—were also those who were morally blameless.

In thinking about this second limitation on the channelling function, we need to consider its complexity: Some ways of making an alternative institution less attractive are maximally coercive, as when they invoke criminal sanctions; others will hardly be coercive at all, as when they simply withhold the state's expression of approval. The costs of the technique importantly depend on the degree of coercion it employs. A sharp example of the more coercive end of the spectrum is prohibiting homosexual conduct. Such a prohibition not only invokes the law's strongest weapon—the criminal law; it also tends to exclude homosexuals from what the twentieth century considers a preeminent part of life—sexual relations.

On the other hand, ending the practice of disadvantaging competing institutions altogether would have its own costs. The channelling function helps tell the people involved in an institution, the world in general, and the law in particular that those people stand in a particular relation to each other. When people marry, they, the world, and the law know that they have assumed special obligations to each other. When a child is born in wedlock, the parents, the child (eventually), the world, and the law know that the parents have taken on special responsibilities to their child. "Functional equivalence" approaches serve this end less well.

Consider *Marvin*. Even had the legal principles established there already been undoubted law in California, Lee Marvin and Michelle Triola might still not have realized that their relationship had become so marriage-like that they risked (or could rely on) legal consequences when they separated. Nor could courts have known whether Marvin and Triola desired those consequences or whether they were, as Marvin claimed, trying to avoid them by not marrying. For the law to treat Marvin and Triola as a family, then, it had to inquire into their particular case. Each such inquiry has its social costs; to-

gether those costs may be non-trivial. Those costs are not only economic, although they are that too. For example, inquiries may intrude painfully into a couple's privacy, as *Marvin* indicates. First, *Marvin* requires courts to ask whether sexual relations are a severable part of the contractual consideration. Second, it mandates a "searching inquiry" into whether the parties tried to avoid a marital relationship. Third, it demands a factual investigation into whether there was an express contract, an implied contract, a partnership, a joint venture, or some other kind of understanding. Channelling institutions, in contrast, set bright lines which establish for all concerned what people's status is. They make it easier for people to predict the consequences of their acts. Further, they protect people from intrusive governmental inquiries.

Like our discussion of the channelling function's first limitation, our discussion of the second must conclude by acknowledging the variety and range of the channelling function and of its attractions and drawbacks. The technique of advantaging favored institutions ranges from hardly troubling to quite problematic, depending on the nature of behavior in the alternative institution and on how coercive the government's advantaging technique is. Once again, therefore, a case-by-case inquiry seems called for.

Channelling's costs might more confidently be paid if its success could be better measured. But a third limitation on the function is the frustrating difficulty of such measurement. It is always hard to separate out either the law's effects on an institution from other effects on it or an institution's effects on behavior from all the other influences people respond to. Nor is it easy to say what aspects of an institution have precisely what effects, so that a defective institution can be rescued by judicious changes without junking its desirable aspects. Even could these measurement problems be overcome, we should still want to know what effects alternative institutions might have, and even crude evidence about them will often be elusive. And even if all these measurements could be made, how would we evaluate them? All significant social institutions are complex, all have defects, none wholly accomplish their goals. What standards should we use in choosing among imperfect institutions?

The difficulty of measuring the channelling function's success in general or in any particular case is undeniable. But should it preclude the state from pursuing the channelling function? That function seeks to accomplish a complex set of broad social purposes, not simply to prevent one obvious harm to an identifiable person. Any such attempt

will resist measurement. But that difficulty arises partly out of the very importance and ambition of the attempt. It seems perverse to say that the only interests the state may pursue are those so narrow that their effects may be accurately measured. No doubt the channelling function relies on unprovable assumptions. But "*all* schemes of statutory regulation are ultimately based on unprovable assumptions about human nature."⁶⁹ Thus the channelling function ought not be dismissed out of hand because measurement is difficult. Here once again, rather, the function and its uncertainties need to be evaluated case by case.

Fourth, and crucially, channelling's worth in any particular instance will depend on the specific institutions it supports. Even if an institution serves the function's ends well, it must be evaluated in terms of *all* its social consequences. The law has supported institutions—pejoratively described as the bourgeois family—which have hardly been universally admired over the last two centuries. In the nineteenth century the family was assailed as a prison by the Romantics and as an instrument of oppression by the Marxists. Today, it faces similar charges from the psychological left and from feminists. If those charges are correct, the law's channelling power was and is, *pro tanto*, badly employed.

Channelling can surely be misused, and people can reasonably disagree about what "misuse" means. However, this is not a reason for abandoning the function. For all the function's uncertainties, inadequacies, and costs, the goals it can be used to promote are both substantial and hard to achieve in other ways. And here I should emphasize yet again that the specific goals I have used as examples are not the only ones channelling can promote. Channelling is not inherently confined to any single set of social ends. Rather, it may be recruited to serve whatever ends seem appropriate.

For example, over the last several decades we have seen systematic and ambitious attempts to restructure "marriage" and "parenthood" in order to change the way people think and act regarding gender. Susan Okin, to take one example among many, urges channelling in this way by noting that the

way we divide the labor and responsibilities in our personal lives seems to be one of those things that people should be free to work out for themselves, but because of its vast repercussions it belongs

69. Schneider, *supra* note 64, at 103.

clearly within the scope of things that must be governed by principles of justice.⁷⁰

She continues by arguing that this conclusion requires that we "encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor. We must work toward a future in which all will be likely to choose this mode of life."⁷¹

Indeed, many recent reforms of family law—made and proposed—can be understood in terms of a desire to employ the channelling function to change the institutional basis of family life in order to change gender relations in American society. For instance, no-fault divorce can be seen as freeing women from the bondage of unsatisfactory marriages. It has been hoped that equitable distribution can lead to a fairer distribution of marital assets than the common-law system of awarding property to the title-holder, partly on the reasoning that the title holder is likelier to be the husband than the wife. Similarly, the category of assets divisible on divorce has been expanded to include (in various ways) forms of wealth like pensions and professional degrees. Rehabilitative alimony has found favor over permanent alimony partly on the principle that the latter conduces to an undesirable dependence of women on men. Gender-neutral rules governing child custody have been urged in part on the ground that they can help establish a social understanding that fathers share with mothers responsibility for the daily care of their children. The Supreme Court has condemned gender roles in a variety of instances, saying that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."⁷² Not only has abortion become a right, but the Court has ruled that that right is expressly a woman's, not a right she shares with her husband. Rules exempting husbands from the purview of rape laws have been eroded. Spouse abuse has begun to be prosecuted more vigorously as part of a broader social campaign directed at violence in the relations between men and women. Anti-discrimination and affirmative-action rules have helped open jobs outside the home to women. Even the title by which married woman are addressed has been widely changed with a view to changing the way married women are thought of and think of themselves.

70. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 171 (1989).

71. *Id.*

72. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

The reforms I have recited have had a variety of goals. Many of those goals are straightforward enough and have to do with directly ameliorating the condition of women in particular contexts. But a central purpose of these reforms can be understood to be altering the institutional situation in which men and women find themselves. I suspect that doing so is crucial if the larger goals that reformers ultimately want to reach are to be achieved. Those goals—which Okin describes as changing the “way we divide the labor and responsibilities in our personal lives”—cannot readily be achieved through direct legislation. Rather, social institutions must be structured and sustained so that “all will be likely to choose this mode of life.”

B. A Case Study: Michael H. v. Gerald D.

I suggested at the beginning of this essay that courts and commentators have often been led astray by their failure to appreciate the way the law may be used to shape and sustain social institutions. I will now seek to instantiate that argument and to make my description of the channelling function more concrete by discussing a recent (and doctrinally consequential) case, the Supreme Court’s opinion in *Michael H. v. Gerald D.*⁷³

In 1976, Gerald D. (“a top executive in a French oil company”) married Carole D. (“an international model”).⁷⁴ In 1978, “Carole became involved in an adulterous affair with a neighbor, Michael H.”⁷⁵ In 1981, she had a child, Victoria D. “Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter.”⁷⁶ However, a blood test soon revealed “a 98.07% probability that Michael was Victoria’s father.”⁷⁷

During the next three years, Victoria stayed with Carole, but Carole moved among the households of Gerald, Michael, and “yet another man, Scott K.”⁷⁸ We cannot tell just how much contact Michael had with Victoria during this period. Justice Scalia’s plurality opinion speaks of “the relationship established between a married woman, her lover and their child, during a three-month sojourn in St. Thomas . . . [and] during a subsequent 8-month period when, if he

73. 491 U.S. 110 (1989). For a fine statement of the case’s doctrinal importance, see Robert F. Nagel, *Constitutional Doctrine and Political Direction*, TRIAL, Dec. 1989, at 72.

74. *Michael H.*, 491 U.S. at 113.

75. *Id.*

76. *Id.* at 113-14.

77. *Id.* at 114.

78. *Id.*

happened to be in Los Angeles, he stayed with her and the child.”⁷⁹ Justice Brennan’s dissent contended that “the evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael ‘Daddy,’ Michael contributed to Victoria’s support, and he is eager to continue his relationship with her.”⁸⁰

So eager was Michael that he “filed a filiation action . . . to establish his paternity and right to visitation.”⁸¹ To cut a long and tumultuous story short, “[i]n June 1984, Carole reconciled with Gerald and joined him in New York, where they now live with Victoria and two other children since born into the marriage.”⁸² Michael’s filiation action encountered a California statute providing

that ‘the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage’ The presumption may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child’s birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife.⁸³

In 1985 the trial court rejected Michael’s claim; in 1987 an appellate court affirmed, and the California Supreme Court denied certiorari.⁸⁴

In 1989 (when Victoria was roughly eight), the United States Supreme Court found the California statute constitutional. Michael, of course, had claimed a fundamental right to a relationship with Victoria and that the statute which barred his filiation action therefore had to be necessary to serve a compelling state interest. The plurality held that he had no such right, and it therefore did not reach the state-interest problem.⁸⁵ Justice Brennan felt that Michael had such a right

79. *Id.* at 124, n.3.

80. *Id.* at 143-44.

81. *Id.* at 115.

82. *Id.*

83. *Id.* (quoting CAL. EVID. CODE § 621(a) (West 1989)).

84. *Id.*

85. The plurality did, however, seem to recruit some reasoning quite compatible with what our legislator might say about the channelling function. Its inquiry into Michael’s rights considered “the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family” and the fact that “persons in the situation of Michael and Victoria . . . [have not] been treated as a protected family unit under the historic practices of our society, . . . [but rather] our traditions have protected the marital family . . . against the sort of claim Michael asserts.” *Id.* at 123-24.

Justice Stevens concurred in the judgment on the grounds that Michael had received

and therefore did reach that problem, but only dismissively.⁸⁶ We, however, should find it useful to ask how the state's interests would look in light of the channelling function.

In channelling terms, the state in *Michael H.* could be said to have two related "institutional" interests: First, an interest in preserving the stability of "marriage" in general and the marriage between Gerald and Carole in particular. Second, an interest in the security of "parenthood" in general and of the relationship between Victoria and her presumptive parents in particular. Both these interests might be reasonably adduced in arguing against allowing Michael either parental rights or a hearing.

A state deploying the channelling function may seek to strengthen the bond between husbands and wives, to promote the strength and stability of marriages. The constitutional legitimacy of that aim seems confirmed by the many cases extolling a couple's constitutional interest in marriage. The state might well conclude that it would damage such relationships to require a couple to litigate with an outsider over the paternity of a child born to the wife during the marriage and to promulgate an official governmental announcement that that child was the wife's but not the husband's. The damage might come from several sources. If the husband did not know of his wife's affair and that "his" child was not "his," he might feel the sharpest kind of pain. His reaction might be bitter and recriminating. The child might be a constant reminder of his wife's infidelity. It would hardly be surprising for him to contemplate divorce.

Even if the husband already knew of his wife's affair, their marriage might still be harmed by the kind of inquiry Michael sought. What couple would welcome such attention to their marital troubles, to the wife's adultery, and to the husband's cuckolded status? A core argument against fault-based divorce is applicable here: that couples ought not have to make a public display of their private lives. Even if devices like concealing the parties' names were used, spouses would still reveal themselves to everyone participating in the

all the hearing he was entitled to.

86. Justice Brennan said that all that was at issue in the case was a hearing, not whether Michael should have visitation or custody rights, and that when a state limits hearings, "it is only the State's interest in streamlining procedures that is relevant." *Id.* at 153. With the plurality, I find it hard to "grasp the concept of a 'right to a hearing' on the part of a person who claims no substantive entitlement that the hearing will assertedly vindicate," *id.* at 127 n.5, and I am not clear why the state may not have substantive interests in denying a hearing.

case. Quite apart from the injury to privacy, all litigation brings misery, and litigation over personal, especially intimate, subjects brings it in abundance. Such misery is unlikely to enhance the couple's marriage. Nor would it help to place the wife in the extremely awkward situation of recounting her betrayal of her marital loyalties or to ask her husband to listen to her do so. And a judicial inquiry would commonly come at the worst time—when the affair had recently ended, the wife had returned to her husband, and they were trying to reconstruct their marriage and their family life. Nor is it easy to believe that, where the natural father won visitation rights, the couple's marriage would benefit from having to share child-rearing with the wife's former lover.

The California rule has several other merits in these terms. An abandoned lover might be bitter, and the rule protects the reunited couple against merely malicious (even if factually well-founded) suits by a vengeful lover. And, of course, the lover's allegation might be false. The rule protects couples from having to resist such accusations. Finally, there would always be a small (roughly two percent) but not irrelevant chance that the blood test was inaccurate.

A state using the channelling function may also want children to be raised in a stable home by two adults, each of whom is preferably the child's parent. Such a state might conclude that a child in Victoria's situation should have two parents who are fully and reliably hers. She cannot live with her two natural parents, but she has a natural mother who is married, whose husband is apparently willing to care and has been caring for the child, and who apparently prefers that her husband (and not her former lover) should do so. The state might conclude from the social experience with children of divorce that, while it can be hard to be raised by two people on difficult terms who do not live together, it would be even worse to be brought up by three people, two of whom (the two men) have reason to be on hostile terms, two of whom (the mother and the lover) have reason to be on tense terms, and two of whom (the mother and the husband) have reason to be struggling to maintain a happy relationship.

The dissent in *Michael H.* would presumably respond that the child's situation is secure because visitation would be ordered only if that were in the child's best interest. However, the state might reasonably conclude that the chances of visitation being in a child's best interests are small enough to justify a general ban on an inquiry. The state might also believe what is often said, that findings about best

interest are uncertain enough to make it wise to avoid such decisions when there are otherwise strong reasons for doing so.⁸⁷

Further, Victoria's well-being and her relationship with Gerald and Carole, like their relationship with each other, might well be injured simply from having to endure a hearing. Like her parents, she has a privacy interest in avoiding the scrutiny a hearing is likely to inflict and an interest in escaping the miseries of litigation. Further, the ability of Victoria's caretakers to be good parents and to maintain an untroubled relationship with her is likely to be injured by a hearing which so basically questions the relationships of everyone involved.⁸⁸ Finally, until the hearing is concluded (and this litigation lasted something like seven years) the child would not know the status of her various parents. This is a kind (and length) of instability that is now widely and wisely deplored.⁸⁹

In sum, California's rule can be seen as buttressing two institutions: a version of marriage and a view of parenthood. It does so by affecting entry into the latter institution, by refusing legal effect to some ways of entering parenthood. And it does so by restricting the forces which can impinge on participants in both institutions. Finally, the rule may reaffirm in people's minds the social importance of marriage and its relationship with parenthood.

Not atypically, the channelling function operates here by disadvantaging the "alternative institution" which Michael sought to create. It denies him the consolation of legally enforced contact with his child. I said earlier that this technique can be problematic. Is it here?

Michael knew when he had the affair with Carole that she was married, and, given the operation of the channelling function and the social assumptions on which it relied, he knew that people commonly lack legal or even social rights in their married lovers' children. Further, the California statute put him at least on constructive notice that any child he had with Carole would legally be considered a child of her marriage (unless one spouse repudiated the child). More, the child was conceived in an adulterous relationship, a relationship Justices have said in dictum the state may make criminal. Finally, Michael

87. See generally Carl E. Schneider, *Discretion, Rules, and Law: Child-Custody Decisions and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991).

88. The state might be similarly concerned with the effects of a hearing on Victoria's siblings.

89. See, e.g., *Lassiter v. Department Social Servs.*, 452 U.S. 18, 32 (1981); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

probably knew that asserting a claim to the child could harm the marriage he may already have damaged. If expectation has anything to do with parental rights, as the Court sometimes seems to say, and if his moral situation is as I have suggested, his claim to parental status does not look strong.

Is all this enough to overcome whatever constitutional rights Michael can assert? Since I share the plurality's skepticism about those rights, and since I find the Court's state-interests tests too mysterious to apply intelligibly,⁹⁰ I cannot say. Nor have I considered other interests the state might assert.⁹¹ But I do think that the channelling arguments are serious ones that should be weighed in any balancing of rights and state interests.

III. CONCLUSION

My enterprise here has been to identify and describe a function of family law which, despite its antiquity and ubiquity, has been scantied in scholarship. I have also made a normative argument, an argument that is importantly limited but also, I think, important. The argument is that the channelling function serves the valuable, the necessary, goal of shaping and promoting the social institutions of family life. The limit is that I have not specified *which* institutions the law ought to prefer. That is too broad and complex a subject for so short a time. Indeed, it is a lifetime's work.

But sufficient unto the day are the quandaries thereof. So let me conclude with a few brief thoughts about the arguments I have made. In discussions of the channelling function, I have found people most troubled by what I think is the sense that it violates the principle that the state should be neutral among visions of the good. The function's institutions necessarily have normative components and thus to some degree favor one such vision over the rest. More, the function seeks, however obliquely, to shape people's thoughts and acts in an area of life in which freedom is widely and properly prized.

As I have tried to make clear, I have no doubt that the channelling function can be misused deplorably. But this essay has been animated in part by the belief that, at least among my likely readers, the faults and failings of institutions have in recent decades received so much attention that their advantages are too little noted and too

90. For some reasons, see Schneider, *supra* note 64.

91. See, e.g., *id.*

readily scanted.⁹² Thus I would make two responses to the argument that the state should not support social institutions because the state should strive for the most complete kind of neutrality. The first is that we value institutions because they can promote goods that the state may legitimately prefer and promote. As I have suggested, the channelling function can be used to serve the (generally valued) protective, arbitral, and facilitative functions of family law. And as I have argued at some length, social institutions serve other estimable functions which cannot easily be otherwise performed.⁹³

Some of my readers will feel that the channelling function is objectionable because its effects must be systematically conservative. There is something in the proposition that social institutions are inherently conservative. Social institutions rest on attitudes that resist change because they are deeply engrained and widely shared.⁹⁴ How-

92. "In what does the self now try to find salvation, if not in the breaking of corporate identities and in an acute suspicion of all normative institutions?" RIEFF, *supra* note 24, at 19. Rieff does not look upon this development with pleasure:

The death of a culture begins when its normative institutions fail to communicate ideals in ways that remain inwardly compelling, first of all to the cultural elites themselves. Many spokesmen for our established normative institutions are aware of their failure and yet remain powerless to generate in themselves the necessary unwitting part of their culture that merits the name of faith.

Id. at 18-19.

93. This is not the place for an investigation of the tension between individual autonomy and collective values. However, for a stimulating and reflective start on the problem, see Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985). Among Sax's services is to begin to sketch some of the complexities of the problem. For instance, he observes that "one preference people can, and do, have, is to yield some of their autonomy in order to obtain the benefits of collective action." *Id.* at 544. He also finds it

far from clear that the maintenance of individual autonomy is the primary goal of most people most of the time . . . [T]here is a great deal of evidence to suggest that one of our strongest urges is to identify ourselves with a source of moral or communal authority, and to subordinate our autonomy to it; that we draw strength from values external to our purely personal convictions; and that we draw values from collective solidarity.

Id. at 545. Another temperate and thoughtful reflection on these tensions is CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1992).

94. It may also be that familial institutions are particularly likely to have a conservative tendency:

Our children, as Peter Berger once put it, serve as "our hostages to history," by which he meant that the human imperative for continuity—the projecting into the future for one's own children, whatever good things one has in one's own life—has an essentially conservative influence on the institutional order. To love one's children is to "have a stake in the continuity of the social order," and to love one's parents is to want to preserve at least something of their world.

Gary Alan Fine & Jay Mechling, *Minor Difficulties: Changing Children in the Late Twentieth*

ever, this does not seem to me wholly bad, for reasons I have tried to suggest. Be that as it may, while social institutions may in important ways be inherently conservative, it would be wrong to see the channelling function in the same light. On the contrary, one of the most significant aspects of the function is exactly its reforming capacity. Because of their social strength, social institutions can be hard to change. There are few levers any person or even any group can press to exert real power directly on most institutions. The government, however, is specially—perhaps uniquely—well situated to try to reform or abolish institutions that have come to seem unsatisfactory.⁹⁵ As I wrote above, the channelling function may be and often is used to shape as well as sustain social institutions, to disfavor as well as favor them.

My second response to the claim that the channelling function is improper because it violates some visions of state neutrality is that, in an important sense, one *cannot* abolish the channelling function in family law. Family law's goals—particularly those goals represented by the protective, arbitral, and facilitative functions—are so central that they are unlikely to be abandoned. As long as we pursue those goals, we will be creating, building on, and shaping social institutions and channelling people into them. The most obvious way to try to escape doing so is by expanding the facilitative function, by turning family law into contract law. That venture could not entirely succeed, of course, if only because family law centrally involves children, and children (particularly the young children about whom we worry most) cannot make contracts. But even if the venture succeeded, it would create a new institution. Contract, after all, has its own social structures, its own assumptions, its own consequences. Indeed, these are at the heart of the resistance to contract law's incursion into the sphere of family life.

Channelling, then, cannot be escaped. It arises because we are social beings whose relations with those around us shape institutions that in turn shape us. It arises because we are imperfect people who without institutions behave in ways that injure our fellows.⁹⁶ It arises

Century, in *AMERICA AT CENTURY'S END* 58, 58 (Alan Wolfe ed., 1991) (quoting Peter Berger, *Sociology and Freedom*, 6 *AM. SOCIOLOGIST* 3-4 (1971)).

95. Thus Llewellyn suggested that the law's sphere is "pressure toward hygienic action in places where no individual can, where no group is well enough organized to, take action in the interest of the whole." Llewellyn, *supra* note 11, at 1299.

96. As Alan Wolfe writes:

We are not born free and corrupted by our institutions. If anything, . . . we are

because we see the faults of the institutions around us and seek to perfect them, because we value the aspirations those institutions embody and hope to achieve them. Channelling, like any social tool, may be and has been used badly and used to bad purposes. But it is also one of the ways we try to use law to soften the harshness of life.

born as selfish egoists, and only our institutions and practices save us from ourselves. A long tradition in social theory holds that individuals are anything but angels. Put them together with no rules to help them define their moral obligations—in prisons or market situations lacking any moral restraint—and they will act as pure market theorists or neo-Hobbesians assume. That they do not act that way all the time is because they have accepted the gift of society

WOLFE, *supra* note 28, at 258-59.